

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(LAND DIVISION)

APPELLATE JURISDICTION

MISC. LAND APPEAL CASE NO. 8 OF 2020

Arising from Land Appeal No. 18/2019 in the District Land and Housing Tribunal for Kigoma, dated 14/07/2020, Hon. F. Chinuku – Chairperson and the original Land dispute No. 13/2018 in Muganza Ward Tribunal)

FENESI S/O AMANI..... APPELLANT

VERSUS

JANITHA S/O KANUBHO..... RESPONDENT

J U D G E M E N T

19th Nov. & 08th Dec. 2020

I.C. MUGETA, J.

This is a second appeal against the concurrent finding of the two lower tribunals. On this account, I can interfere with such a concurrent finding of the lower Tribunals, if satisfied that there was misapprehension or misapplication of the law on part of the lower tribunals.



The facts of the case are that the respondent is a daughter of one Amani who married two wives. The appellant is a grandson of Amani born to his son sired by the co-wife to the mother of the respondent. The respondent, therefore, is the aunt of the appellant. Mzee Amani died in 1992 survived by his two wives. His land was divided into two pieces which were given to each wife to cultivate with his children. The respondent had a brother who cultivate with their mother the land assigned to her through their mother. The appellant's father and his siblings also cultivated the land assigned to their mother. This way, life continued peacefully among Mzee Amani's descendants and finally all heirs inherited on their mother's line.

The respondent testified before the Ward Tribunal that their mother divided her land between her and her brother before he died. Since she was married, her brother cultivated her land too. Upon death of the brother, her land became idle and that is when the appellant encroached it hence this dispute. On his part the appellant gave evidence that the dispute land belongs to his father and the respondent used it as a mere licensee on permission of his father.

The respondent referred the dispute to the Ward Tribunal which decided in her favour. The appellant unsuccessfully appealed to the District Land and Housing Tribunal, hence, this second appeal.

The appellant who is represented by Sadiki Aiki, learned advocate filed five grounds of appeal. The respondent is unrepresented. The grounds of appeal are:-

- 1. That the appellate tribunal erred in law and facts for deciding the land appeal in favour of the Respondent while it was not properly constituted and the judgment was pronounced without requiring opinion of assessors as mandatorily enjoined by the law.*
- 2. That the appellate tribunal erred in law and facts for deciding the land dispute in favour of the Respondent while there is undisputed evidence on records that the land in dispute has been used by the appellant as the same was owned by the appellant's father and that the Respondent herself in her testimonies before the trial tribunal amplified members of the trial*

tribunal that her parents bequeathed the land in dispute to her and her brother who is the appellant's father.

3. That the appellate tribunal erred in law and facts in holding that the land in dispute is the property of the Respondent in that she was bequeathed the land in dispute by her late mother after the demise of her late father one Kanubho while the land was the property of the late Kanubho who died intestate and there was no any administration of the estate was ever done and distribute the estate to his heirs.

4. That the appellate tribunal erred in law and facts in deciding the land in dispute in favour of the Respondent while the Respondent failed to prove her claims on the land as she generally testified that her late mother bequeathed the land in dispute to her and her brother who was the Appellant's father while on the other hand PW1 (Yudita Amani) testified that the

Respondent was given the land in dispute by their late grandfather.

5. That the appellate tribunal erred in law and facts by holding that the Respondent has been using the land in dispute for long period of time without any proof on how the Respondent was using the land and when she was given the land and when she started using the same land.

Sadiki Aiki argued the first and fifth grounds separately while the second, third and fourth grounds were also combined.

On the first ground of appeal, the learned counsel submitted that the District Land and Housing Tribunal did not consider the opinion of assessors which are neither reflected on record nor were read to the parties which is contrary section 23 of the Land Disputes Courts Act [Cap. 216 R.E. 2002] read together with regulation 19 of G.N. 174/2003. To buttress his argument the learned counsel cited the case of **Benedict Lubuva (as administrator of the estate of the late Mohamed Lubuva) vs John Mwigune and 4 others**, Misc. Land Appeal No. 27/2019, High Court, Iringa Registry (unreported). In that case it was

held that failure to cause the written opinion of the assessors to be read in the presence of the parties is an incurable defect and renders proceedings a nullity. The respondent being unrepresented layperson had nothing useful to tell the court.

While the opinion of assessors at the District Land and Housing Tribunal are filed on record, indeed, the same were not read out to the parties. In the cited case it was held that failure to read assessors' opinion to the parties is fatal to the proceedings. However, I find the cited case, which is based on decided cases by the Court of Appeal, being distinguishable from the present situation. While in that case the District Land and Housing Tribunal was exercising its original jurisdiction, in this case it was exercising its appellate jurisdiction. Therefore, even if I declare the proceedings of the District Land and Housing Tribunal as a nullity, the proceedings of the trial Ward Tribunal shall remain intact and subject to my consideration. Since the District Land and Housing Tribunal was not exercising its original jurisdiction, I hold that failure to read the opinion of the parties never prejudiced any party. Such proceedings, in my view, are saved by section 45 of the Land Disputes Courts Act [Cap. 216 R.E. 2019].

So, while the complaint in the first ground has truth in it, it does not bar me from considering the appeal on merits.

On the second, third and fourth grounds of appeal, Mr. Sadiki submitted that the land belongs to the appellant because he inherited it from his father. He submitted further that the argument that the respondent was granted the land by her parents is unsubstantiated or supported by independent witnesses. The respondent replied that the land was given to her when still a young girl and she has been using it until 2017 when the appellant trespassed into that land.

In its decision, the Ward Tribunal stated:-

'Baada ya kupitia mwenendo mzima wa shauri hili baraza limebaini yafuatayo:-

(i) Mdai pamoja na shahidi wake walichokieleza ni sahihi.

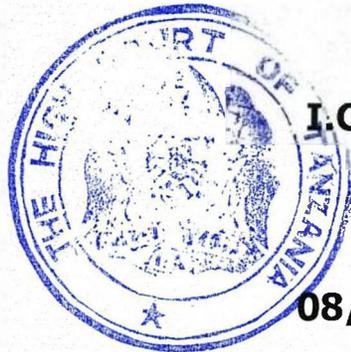
(ii) Mdaiwa pamoja na mashahidi wake hawakuwa na ukweli kwa kile walichokieleza'

It follows, therefore, that the trial Ward Tribunal, rightly so, decided the case on merits of the evidence based on the credibility of witnesses.

Assessment of credibility of witnesses is an exclusive domain of the trial court. The trial court's finding on the credibility of witnesses is usually binding on the appellate court except where there is misdirection or none direction on facts by the trial court or tribunal which can entitle an appellate court to reassess the credibility of witnesses. I see nothing on record upon which I can validly fault the trial Tribunal's finding on credibility of witnesses. The respondent was supported by Yudita Amani (PW2) who is a blood sister of the appellant. On his part, the appellant's witnesses said the land belongs to Amani which is undisputed fact. None of them testified on the distribution of that land after Amani died. The Ward Tribunal was entitled to find the respondent and her witness more credible.

Regarding the fifth ground, the learned counsel has submitted that the respondent, indeed, has used the land for a long time but she was a mere licensee by the appellant's father. I find no such evidence in the record of the Ward Tribunal. The evidence is that the dispute land is her mother's land which she inherited together with her brother who has passed away. The appellant has trespassed on that land. She is, therefore, the owner and not licensee.

In the event, I find the appeal devoid of merits. I dismiss it with costs.



Mugeta
I.C. Mugeta

Judge

08/12/2020

Court: Judgment delivered in chambers in the presence of both parties.

Sgd: I.C. Mugeta

Judge

08/12/2020